

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

Marie Culleton operating Better Care Home Support

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Paul E. Love

FILE NO.: 98/212

DATE OF DECISION: JUNE 23, 1998

DECISION

OVERVIEW

This is an appeal by Marie Culleton (the “employer”) of a Determination made March 16, 1998 finding that Pamela Shimek was an employee and was entitled to overtime wages, vacation pay and statutory holiday pay in the amount of \$1,604.23 for 1996. The employer argued that at the relevant time Ms. Shimek was an independent contractor, and thus the employer was not required to pay holiday pay. The employer raised no facts or issues in this appeal from which one could conclude that the Director’s Delegate erred. The Determination was therefore confirmed.

ISSUE TO BE DECIDED

Did the Director’s delegate err in determining that Pamela Shimek was an employee and entitled to overtime wages, vacation pay and statutory holiday pay?

FACTS

Ms. Shimek worked as a care aid with Better Care Home Support, an unincorporated proprietorship owned by Marie Culleton. According to the employer, the employee quit after she was chastised for her treatment of a client – leaving a client in a cold kitchen without a housecoat. The employee made a complaint to the Employment Standards Branch with regard to non-payment of holiday pay. The employer had paid statutory holiday pay for 1997 but not 1996.

The Director’s delegate found that during an initial period Ms. Shimek was paid \$140.00 per shift for a sixteen hour shift. The rate of pay was increased to \$150.00 per shift. The evidence of Ms. Shimek was that Ms. Culleton dictated the rate of pay, and the work to be performed. The cheques were issued to Ms. Shimek, and not to a company. Ms. Shimek worked at the employer’s place of business. Her pay was by the hour and was scheduled by the employer. The Director’s delegate considered the employer’s argument that Ms. Shimek was a sub-contractor and not an employee. He found that Ms. Shimek had signed a sub-contract agreement about 4 months after commencing with the employer. He also found that Ms. Shimek was forced to sign the contract. The Director’s delegate applied the “four fold test” and determined that Ms. Shimek was an employee.

The Director’s delegate found that the sum of \$1,604.23 was due and owing for overtime wages, vacation pay and statutory holiday pay for the period of April 12, 1996 to December 31, 1996. The finding of the amount due and owing was not challenged by the employer in this appeal.

In a very rambling written submission, dated April 5, 1998, which was also copied to the Premier, Ms. Culleton states in part as follows:

... I have already offered an explanation to the author of this letter, namely Gerry Omstead but as he feels he supercedes Revenue Canada I will reiterate this explanation and also point out his outrageous other breaches.

In April of 1997 Revenue Canada told me that I was in breach of the Employment (sic) Act because I hired people as subcontractors, although I did get this information over the phone from Revenue Canada, when I first opened the business.

After the fact, I was told I had been misinformed and Revenue Canada made me pay retroactively to the beginning of 1997, all Income Tax, CPP and EI on behalf of the care workers who were with me at that time. It was clearly pointed out to me that they would not go back to 1996 as they would bankrupt me and put me out of business and the care workers out of work and obviously nobody would be paying taxes. ...

... With regard to Pamela Shimek. Revenue Canada deemed her to be a subcontractor in 1996. And she signed a contract and took holidays without holiday pay knowing she was a subcontractor. And 2 years later she is asking for holiday pay? Come on?

I have also reviewed Ms. Culleton's letter to Jill Walker, Director of the Employment Standards Branch dated February 20, 1998, and Gary Omstead dated February 20, 1998 the Tribunal dated May 4, 1998. These letters do not assist me with regard to the adjudication of this matter.

I have also reviewed the submission made by Ms. Shimek dated April 20, 1998. She points out in this submission that Ms. Culleton determined when she would work, where should work and how many shifts she would work. Ms. Shimek indicated that her rate of pay was determined on an hourly basis. She indicated that she used cleaning supplies and food supplied by Ms. Culleton. Ms. Shimek indicates that she was told what to clean for every shift, and what foods to cook for the clients.

ANALYSIS

The burden of proof, in this case, rests with the employer to demonstrate errors in the Determination, such that I should vary, or cancel the Determination. The Director's delegate appears to have correctly identified the test to be applied in determining whether a person is an employee or contractor. The test has been recited in a number of cases before the Tribunal including *Western Cheese Ltd.*, BC EST D365/97 *Wolonchuk*, BC EST D462/97.

Ms. Shimek was hired by Ms. Culleton. She was paid wages by Ms. Culleton. She performed work under the direction and supervision of Ms. Culleton. There was no opportunity for profit or loss by Ms. Shimek. There was no ownership or provision of tools. Ms. Shimek was integrated into the employer's operation. Ms. Culleton appears to fit squarely within the plain meaning of the definition of employer in s. 1 of the *Act*:

“employer” includes a person

- a) who has or had control or direction of an employee, or
- b) who is or was responsible, directly or indirectly, , for the employment of an employee

The Director's delegate found that Ms. Shimek signed the subcontract agreement under force or duress. Ms. Culleton's argues that this is ridiculous because Ms. Shimek is younger and larger than herself. The contract was signed 4 months after the employment commenced. There appears to be no reason or consideration for the signing of the new contract by Ms. Shimek, other than to maintain a position with the employer. Ms. Shimek says that she signed the agreement to keep her job.

This is not an appropriate case to define what facts suffice to support a finding of duress or force in the signing of an employment contract. Age and physical size may be factors to consider as well as relative power or inequality of bargaining power. I decide this point solely on the basis of the application of the burden of proof. Applying, the proper burden of proof, I am not satisfied that the Director's delegate erred in this finding of fact.

I am not persuaded by Ms. Culleton's argument that the Director's delegate erred in the application of the appropriate test or the application of the test to the facts. I am not persuaded of any error in the facts found by the Director's delegate.

Further it appears that any assessment by Revenue Canada of Ms. Culleton's situation is not helpful or persuasive to me. Ms. Culleton did not tender any proof in these proceedings that Revenue Canada considered Ms. Shimek a subcontractor. Ms. Shimek points out that an arrangement was struck between Ms. Culleton and Revenue Canada concerning Ms. Culleton's failure to pay statutory deductions.

Revenue Canada is a federal government department and deals with federal obligations such as income tax, employment insurance and Canada Pension Plan deductions. The *Act* is a provincial government law. This employer is bound by both the laws of Canada and the laws of British Columbia. An employer must remit the statutory deductions to Revenue Canada. It may also have statutory deductions to remit to the provincial government eg. Workers Compensation Board assessments. This employer is obliged to pay statutory holiday pay by the *Act*. It further appears that Ms. Culleton made an arrangement with Revenue Canada settling her liability to pay statutory deductions owing under federal legislation. The Director was not a party to any such discussion and therefore is not bound by any such arrangement.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination in this matter, dated March 16, 1998 be confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal